SUPREME COURT NO. 86033-5
COURT OF APPEALS NO. 39119-8-II

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

ANTHONY MARQUISE EMERY, JR.

Petitioner.

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STATE OF WASHINGTON
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ON APPEAL FROM THE SUPERIOR COURT OF THE STATE OF WASHINGTON FOR PIERCE COUNTY

The Honorable Bryan E. Chushcoff

SUPPLEMENTAL BRIEF OF PETITIONER

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A. Issues For Review

1. In State v. Monday, 171 Wn.2d 667, 680, 257 P.3d 551, (2011), this Court held that when the State appeals to racial bias which undermines the defendant's credibility or the presumption of innocence, it will vacate the conviction unless the State can show beyond a reasonable doubt that the misconduct did not affect the verdict. Should this Court, as vigilant guardians of all constitutional rights, apply the constitutional harmless error standard here where the State's misconduct undermined the presumption of innocence, shifted the burden of the State to prove guilt beyond a reasonable doubt, and misstated the role of the jury?

2. Under the Due Process Clause, "criminal prosecutions must comport with prevailing notions of fundamental fairness" and this standard of fairness requires that "defendants be afforded a meaningful opportunity to present a complete defense." California v. Trombetta, 467 U.S. 479, 485, 104 S. Ct. 2528, 81 L. Ed. 2d 413 (1984). Was Emery denied his right to effective assistance of counsel because defense counsel failed to move for a severance where the co-defendants' defenses were antagonistic and mutually exclusive and consequently a joint trial deprived Emery of a fair trial and a meaningful opportunity to present a complete defense?

3. Under the cumulative error doctrine, a defendant may be entitled to a new trial where errors cumulatively produced a trial that was fundamentally unfair. In re Personal Restraint of Lord, 123 Wn.2d 296, 332, 868 P.2d 835 (1994). Is Emery entitled to a new trial where the cumulative effect of the State's misconduct and violation of his right to effective assistance of counsel denied Emery his constitutional right to a fair trial?

B. STATEMENT OF THE CASE

Anthony Emery, Jr. and Aaron Olson were tried in a joint trial. Olson's counsel moved for severance of the defendants numerous times but the trial court denied the motions. 7RP 40-41, 58; 9RP 84; 13RP 621-23; 14RP 777-81.

The complaining witness, G.C., testified that she was formerly employed as a pharmacy technician at Walgreens in Tacoma. 9RP 90. On February 26, 2006, after finishing work at about 11:00 p.m., she walked to her car parked in back of the store. 9RP 90-92. She tried to open the newly bought car but could not open the door with her key. After trying the key on all the doors, she called her boyfriend on her cell phone. 9RP 91-93. Her boyfriend could not leave immediately so she decided to return to Walgreens. 9RP 94-95.

As G.C. turned around to walk back to the store, "I saw two guys pointing a gun at me in my stomach." 9RP 95. The "white guy" pointed the gun at her and asked her for money while the "Filipino kind of guy" stood by him. 9RP 100-02. Then the white guy took her cell phone. 9RP 102-03. When she told them that she had no money, the white guy directed her to open the car door, "I just put the key, and the car opens." 9RP 104. They asked her to get in the car and the white guy got in the passenger seat while the Filipino guy sat in the back. 9RP 104. Knowing that she was being abducted, G.C. emptied personal items out of her pockets onto the parking lot hoping her boyfriend would find them when he came to look for her. 9RP 104-06.

The white guy who was giving the orders told her to drive to Market Place. The Filipino guy was "[j]ust following whatever the white guy said." 9RP 107-09. Upon arriving at Market Place, they told her to park in the parking lot and they asked again for money. 9RP 111-12. When she repeated that she did not have any money, the white guy told her to get in the back "because we are going to rape you." 9RP 112. G.C. pleaded for them to let her go fabricating that she was pregnant. 9RP 113. The white guy then said since she was pregnant, she would have to perform oral sex. 9RP 113-14. She performed oral sex on both men and wiped their semen on her clothing to leave DNA evidence. 9RP 114-19.

Thereafter, the white guy drove to Safeway and the men got out in the parking lot and walked away. 10RP 131-33.

G.C. drove to a friend's house nearby and her friend's husband called the police. The police arrived and she was taken to the hospital. 10RP 136-39. The police created composite sketches based on descriptions that she provided. 10RP 151-53. She later identified Emery as the Filipino guy from a photo montage but could not identify the white guy. 10RP 145. At trial, G.C. identified Emery in court but said she did not recognize Olson. 10RP 154-55.

Idanya Gonzales and her husband were awakened by their door bell repeatedly ringing at around 12:30 a.m. 11RP 286-87. Gonzales' husband went to open the door and G.C. rushed in crying and screaming. 11RP 287. She said she was "violated." 11RP 288. Gonzales tried to calm G.C. down while her husband called 911. 11RP 288. G.C. told her that she was confronted by two men with a gun in the parking lot where she worked. 11RP 289-90, 314-15. The police arrived shortly thereafter and G.C. was taken to the hospital. 11RP 291, 315.

Sergeant Curtis was dispatched to the Gonzales residence shortly after midnight to investigate a reported rape. 10RP 229, 233. Idanya Gonzales greeted her at the door and took her to the bathroom where G.C. was lying on the floor. 10RP 234-35. G.C. said she was leaving work

when two men forced her into her car and tried to rob her then forced her to perform oral sex. 10RP 235. The fire department arrived and transported G.C. to the hospital. 10RP 243-44. Curtis waited while G.C. was examined at the hospital then escorted her to the Tacoma Police Department to collect evidence from her clothing. 10RP 244-45, 247-48.

Officer Campbell, a forensic specialist, met with G.C. at the forensics trace lab of the Tacoma Police Department. 10RP 187-88. Campbell swabbed G.C.'s mouth for semen and removed her work smock, sweater, and pants and placed them in evidence bags. Thereafter, she submitted the evidence to the property room. 10RP 190-93. Detective Shake prepared composite sketches of two suspects based on descriptions provided by G.C. 11RP 298-300.

Officer Heilman reported to Walgreens and inspected the parking lot where she found a tube of Blistex, a ballpoint pen, and other items which were photographed and collected by forensics. 10RP 255-56. Then Heilman went into Walgreens and viewed a surveillance tape provided by the store. 10RP 258-59. The videotape revealed G.C. walking to her car and walking around it as if she was having difficulty getting into it. G.C. kept walking around the car then Heilman saw "what appeared to be a white male approach her, but the video quality wasn't very good, so I

couldn't say for sure." 10RP 260. Heilman could recognize that the car's brake lights came on and it pulled out of the parking lot. 10RP 260.

Officer Velez, a forensic specialist, photographed and collected evidence from G.C.'s car. 11RP 375-76. He collected a beverage bottle, a lighter, and some breath mints from inside the car. 11RP 381. While processing the car, Velez collected six latent fingerprints with four of the fingerprints matching the prints of G.C. and her boyfriend. 11RP 402. When Velez compared the other two fingerprints with Emery's prints, the results "were positive for one of the latent impressions and inconclusive for the last impression." 11RP 403.

Detective Turner, received a tip from a fellow officer who gave him the name of Aaron Olson. Turner used various databases and located an address for Olson within a few blocks from Walgreens and linked Olson with Emery. 11RP 335-38, 342-43. He created two photomontages and provided them to G.C. She identified Emery but could not identify Olson. 11RP 344-48. After further investigation, Turner conducted a search of Olson's home and collected evidence. On December 15, 2006, police arrested Olson and Emery. 11RP 349-50.

Jeremy Sanderson, a forensic scientist for the Washington State Patrol Crime Lab, performed an analysis of items he received from the Tacoma Police Department, including semen samples from G.C.'s

clothing and DNA taken from Olson and Emery. 12RP 533-34. Sanderson compared the results of DNA profiles from G.C.'s clothing to the DNA profiles from Olson and Emery and concluded that they matched. 12RP 547-48.

Emery testified that on the night of February 27, 2006, he and Aaron Olson were walking to Olson's house when they saw G.C. coming out of Walgreens. Emery thought Olson may have known G.C. because he approached her as she walked to her SUV in the parking lot, "Aaron walks up to her, and they have some sort of conversation. I wasn't close enough to hear exactly what was being said." 13RP 631-33. Emery was wearing his headphones and listening to music on his Sony Walkman while Olson and G.C. were talking. 13RP 634. Then Olson motioned Emery over to the car so he believed G.C. was giving them a ride. G.C. drove to Market Place and parked in the parking lot where Olson told him "there was going to be mutual sex." 13RP 635-37. Emery got out of the car to give them privacy and stood outside listening to his CD player. Then he heard a tap on the car window and Olson moved to the front seat so Emery got in the back where G.C. was seated, "I proceeded in the back seat and had oral sex, and then we left. Once we finished we left." 13RP 640. G.C. dropped them off at Safeway and they walked to Olson's home. 13RP 640.

Emery believed the oral sex was consensual because G.C. "appeared normal; she wasn't crying; she wasn't fighting, anything for me to think that there was any wrongdoing." 13RP 641. Olson did not have a gun or demand money from G.C. and they did not take her cell phone. 13RP 634-35, 641, 659-60. Emery explained that he chose to testify because he was being wrongly accused and he did not rape anybody. 13RP 642.

Olson testified in rebuttal, denying that he was with Emery on February 27, 2006. 14RP 725-26. Olson denied meeting G.C. and disputed the DNA results, "Your DNA expert came in here and inaccurately described that my DNA was there. I was not there that night." 14RP 731-33.

During closing argument, while explaining the meaning of reasonable doubt, the prosecutor told the jury that if it had any doubt, it must fill in the blank:

> What it means is, in order for you to find the defendant not guilty, you have to ask yourselves or you'd have to say, quote, I doubt the defendant is guilty, and my reason is blank. A doubt for which a reason exists. If you think that you have a doubt, you must fill in the blank. Ask yourself, what is my reason to doubt? That is what the law inquires, a doubt for which a reason exists.

15RP 830.

The prosecutor concluded his argument by directing the jury to speak the truth and find Emery and Olson guilty:

> I want to talk to you right now about a Latin term, "verdictim." The Latin term "verdictum" I'm told is the Latin root for the English work "verdict." The literal translation for "verdictum" into the English language is to speak the truth. Your verdict should speak the truth.
>
> In this case, the truth of the matter, the truth of these charges, are that Aaron Olson is guilty of Robbery in the First Degree, Kidnap in the First Degree, which is the same for Tony Emery, for the offenses that he committed of February 27, 2006, against [G.C.].
>
> Members of the jury, I ask you, go back there to deliberate, consider the evidence, use your life experience and common sense, and speak the truth by holding these men accountable for what they did.

15RP 831-32.

The prosecutor used PowerPoint slides to emphasize his argument. CP 246, 248-49. Defense counsel did not object to the prosecutor's remarks.

The jury convicted Emery of kidnapping in the first degree, robbery in the first degree, and two counts of rape in the first degree. 16RP 913-15; CP 174-76. The court sentenced Emery to 291 months in confinement and community custody. 18RP 19-20; CP 186-87.

C. ARGUMENT

1. EMERY'S CONVICTIONS MUST BE REVERSED BECAUSE THE PROSECUTOR'S

MISCONDUCT UNDERMINED THE PRESUMPTION OF INNOCENCE, SHIFTED THE BURDEN OF THE STATE TO PROVE GUILT BEYOND A REASONABLE DOUBT, AND MISSTATED THE ROLE OF THE JURY.

A prosecuting attorney's duty is to see that an accused receives a fair trial. State v. Belgrade, 110 Wn.2d 504, 516, 755 P.2d 174 (1988). "Prosecutorial misconduct may deprive the defendant of a fair trial. And only a fair trial is a constitutional trial." State v. Charlton, 90 Wn.2d 657, 664-65, 585 P.2d 142 (1978). In cases of prosecutorial misconduct, the touchstone of due process analysis is the fairness of the trial, that is, did the misconduct prejudice the jury thereby denying the defendant a fair trial guaranteed by the due process clause. Smith v. Phillips, 455 U.S. 209, 210, 102 S. Ct. 940, 71 L. Ed. 2d 78 (1982); State v. Weber, 99 Wn.2d 158, 164-65, 659 P.2d 1102 (1983).

Prosecutorial misconduct is grounds for reversal if the conduct was both improper and prejudicial. State v. Fisher, 165 Wn.2d 727, 747, 202 P.3d 937 (2009). In State v. Monday, 171 Wn.2d at 675, this Court recognized that generally, a prosecutor's improper comments are prejudicial only when there is a substantial likelihood the misconduct affected the jury's verdict. However, this Court reasoned that "[i]f our past efforts to address prosecutorial misconduct have proved insufficient to deter such conduct, then we must apply other tested and proven tests."

Id. at 680. Accordingly, this Court held that when a prosecutor appeals to racial bias which undermines the defendant's credibility or the presumption of innocence, it will vacate the conviction unless the State can show beyond a reasonable doubt that the misconduct did not affect the jury's verdict. Id. This Court noted it was important that the court's task is not to determine whether there was sufficient evidence to sustain the jury's verdict but to determine whether Monday is entitled to relief because of the prosecutor's improper comments. Id. n. 4.

This Court has applied the constitutional harmless error standard in other instances where the State has violated a defendant's constitutional rights. State v. Easter, 130 Wn.2d 228, 242-43, 922 P.2d 1285 (1996)(pre-arrest right to remain silence); State v. Fricks, 91 Wn.2d 391, 396-97, 588 P.2d 1328 (1979)(post-arrest right to remain silent). Likewise, the Court of Appeals has applied the constitutional harmless error standard where the State has violated the constitutional rights of a defendant. State v. Moreno, 132 Wn. App. 663, 672, 132 P.2d 1137 (2006)(right to self-representation); State v. Fleming, 83 Wn. App. 209, 216, 921 P.2d 1076 (1996), review denied, 131 Wn.2d 1018 (1997)(misstated the burden of proof and role of the jury and infringed on right to remain silent); State v. Fiallo-Lopez, 78 Wn. App. 717, 728-29, 899 P.2d 1294 (1995)(right not to testify).

The constitutional harmless error standard should apply here where the prosecutor undermined the presumption of innocence, shifted the burden of the State to prove guilt beyond a reasonable doubt, and misstated the role of the jury. The presumption of innocence is the "bedrock upon which the criminal justice system stands." State v. Bennett, 161 Wn.2d 303, 315, 165 P.3d 1241 (2007). The prosecutor infringed on this fundamental right by telling the jury that in order to find the defendant not guilty, it must fill in the blank, "you have to ask yourselves or you'd have to say, quote, I doubt the defendant is guilty, and my reason is blank." 15RP 830. As the Court of Appeals held, the "fill in the blank" argument was improper because it "subverted the presumption of innocence by implying that the jury had an initial affirmative duty to convict and that the defendant bore the burden of providing a reason for the jury not to convict him." State v. Emery, 161 Wn. App. 172, 194-95, 253 P.3d 413 (2011)(citing State v. Anderson, 153 Wn. App. 417, 220 P.3d 1273 (2009), review denied, 170 Wn.2d 1002 (2010)). The court concluded that the argument was "so flagrant and ill intentioned that a jury instruction could not have cured it." Emery, 161 Wn. App. at 194-95 (citing State v. Venegas, 155 Wn. App. 507, 228 P.3d 813, review denied, 170 Wn.2d 1003 (2010)).[1] The prosecutor committed further misconduct

[1] The prosecutor's misconduct was particularly flagrant and ill intentioned where the trial

by repeatedly directing the jury to "speak the truth" and find Emery and Olson guilty. 15RP 831-32. The Court of Appeals reiterated its holding in Anderson that such argument is improper because a "jury's job is not to solve the case . . . [r]ather, the jury's duty is to determine whether the State has proved its allegations against a defendant beyond a reasonable doubt." Emery, 161 Wn. App. at 193-95. [2]

The record substantiates that the misconduct was not harmless beyond a reasonable doubt, but even if the constitutional error standard is not applied, there is a substantial likelihood that the misconduct affected the jury's verdict in light of the evidence. The record reflects that Emery and G.C. presented conflicting testimony, but G.C.'s testimony supported Emery's defense that he believed the act was consensual. Emery testified that G.C. "appeared normal; she wasn't crying; she wasn't fighting, anything for me to think that there was any wrongdoing." 13RP 641.

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court instructed the jury on reasonable doubt following WPIC 4.01, which was approved by this Court in State v. Bennett. CP 137. This Court directed trial courts to use only WPIC 4.01 to instruct juries that the State has the burden of proving every element of the crime beyond a reasonable doubt. 161 Wn.2d at 318. This Court emphasized that "the presumption of innocence is simply too fundamental, too central to the core of the foundation of our justice system not to require adherence to a clear, simple, accepted, and uniform instruction." 161 Wn.2d at 317-18. By improperly telling the jury that reasonable doubt means that if it had a doubt, it must fill in the blank, the prosecutor unnecessarily and inexcusably tampered with the jury instruction which in and of itself amply explained reasonable doubt.

[2] The Court of Appeals has repeatedly held that the "fill in the blank" and "speak the truth" arguments are improper: State v. Johnson, 158 Wn. App. 677, 243 P.3d 936 (2010), review denied, 171 Wn.2d 1013, 249 P.3d 1029 (2011); State v. Evans, 163 Wn. App. 635, 260 P.3d 934 (2011); State v. Walker, WL 5345265 (Nov. 8, 2011).

Critical to Emery's defense, G.C. testified that "in the time that I was with them, I didn't cry at all. I didn't even have one tear." 10RP 136. G.C.'s testimony that she showed no emotion during the incident validated Emery's defense. Furthermore, G.C. stated that the Filipino guy was "[j]ust following whatever the white guy said," which is consistent with Emery's belief that the oral sex was consensual because Olson told him "there was going to be mutual sex." 9RP 107-09, 13RP 635-37. Importantly, Officer Heilman testified that the Walgreens surveillance tape showed G.C. walking around her vehicle and she could see a "white male" approaching G.C. 10RP 260. Heilman's testimony corroborates Emery's explanation that he thought Olson knew G.C. because Olson walked up to her and they had a conversation but he was not close enough to hear what was said. 13RP 631-33.

Under either standard, reversal is required where the prejudicial effect of the prosecutor's misconduct which undermined the presumption of innocence, shifted the burden of proof, and compelled the jury to speak the truth by finding the defendants guilty, denied Emery his constitutional right to a fair trial.

2. EMERY'S CONVICTIONS MUST BE REVERSED BECAUSE DEFENSE COUNSEL'S PERFORMANCE WAS DEFICIENT IN FAILING TO MOVE FOR A SEVERANCE OR JOIN CO-COUNSEL'S MOTIONS TO SEVER BECAUSE

THE CO-DEFENDANTS' DEFENSES WERE ANTAGONISTIC AND MUTUALLY EXCLUSIVE AND EMERY WAS PREJUDICED BY DEFENSE COUNSEL'S DEFICIENT PERFORMANCE.

A trial court should sever defendants' trials at any point in the trial whenever "upon consent of the severed defendant, it is deemed necessary to achieve a fair determination of the guilt or innocence of a defendant." State v. Grisby, 97 Wn.2d 493, 506, 647 P.2d 6 (1982); CrR 4.4(c)(2). Trial courts properly grant severance motions only if a defendant demonstrates that a joint trial would be "so manifestly prejudicial as to outweigh the concern for judicial economy." State v. Hoffman, 116 Wn.2d 51, 74, 804 P.2d 577 (1991). "Specific prejudice may be demonstrated by showing antagonistic defenses conflicting to the point of being irreconcilable and mutually exclusive." State v. Medina, 112 Wn. App. 40, 52-53, 48 P.3d 1005 (2002). For defenses to be irreconcilable, they must be "mutually exclusive to the extent that one [defense] must be believed if the other [defense] is disbelieved." State v. Johnson, 147 Wn. App. 276, 285, 194 P.3d 1009 (2008)(quoting State v. McKinzy, 72 Wn. App. 85, 90, 863 P.2d 594 (1993). Where the jury must disbelieve one defense in order to believe the other, the defenses are mutually exclusive. State v. Lane, 56 Wn. App. 286, 298-99, 786 P.2d 277 (1989).

Here, Olson's counsel moved to sever the defendants numerous times but the trial court repeatedly denied the motions. 7RP 40-41, 58; 9RP 84; 13RP 621-23; 14RP 777-81. The record substantiates that the trial court abused its discretion in denying the motions because Emery's and Olson's defenses were clearly antagonistic, irreconcilable, and mutually exclusive. Emery's defense was that he thought Olson knew G.C. and because Olson told him "there was going to be mutual sex," he believed the oral sex was consensual. 13RP 631-38. Conversely, Olson's defense was that he was at home that night and not with Emery. 14RP 725-33. It is evident that the jury must disbelieve one defense in order to believe the other because obviously it could not believe that Emery was with Olson and believe that Olson was not there at all. At the close of all the evidence, it became abundantly clear that Emery's and Olson's defenses were antagonistic and mutually exclusive, given Emery's testimony and Olson's rebuttal. Consequently, the court abused its discretion when it denied co-counsel's renewed motion to sever.

Both the Sixth Amendment of the United States Constitution and article I, section 22 of the Washington Constitution guarantee the right to effective assistance of counsel. "The purpose of the requirement of effective assistance of counsel is to ensure a fair and impartial trial." State v. Thomas, 109 Wn.2d 222, 225, 743 P.2d 816 (1987). To establish

ineffective assistance of counsel, a defendant must show that counsel's performance was deficient and the deficient performance resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Counsel's performance is deficient when it falls below an objective standard of reasonableness. State v. Stenson, 132 Wn.2d 668, 705, 940 P.2d 1239, cert. denied, 523 U.S. 1008, 118 S. Ct. 1193, 140 L. Ed. 2d 323 (1998). To show prejudice, the defendant must establish that "there is a reasonable probability that, except for counsel's unprofessional errors, the result of the proceeding would have been different." State v. McFarland, 127 Wn.2d 322, 335, 899 P.2d 1251 (1995).

In light of the fact that Emery's and Olson's defenses were antagonistic and conflicting to the point of being irreconcilable and mutually exclusive, defense counsel's performance was deficient in failing to properly move for a severance or join co-counsel's motions to sever in accordance with CrR 4.4(a). Emery was prejudiced by the deficient performance where as a result of the joint trial, Olson created a spectacle during Emery's testimony, infringing on his constitutional "right to appear and defend in person." Wash. Const. art. I, section 22. As this Court observed in State v. Martin, 171 Wn.2d 521, 531, 252 P.3d 872 (2011), "article I, section 22 of our state constitution explicitly recognized the

right of defendants to appear, to present a defense, and to testify. It is reasonable to assume from that fact that the drafters of this provision believed that these rights are of great importance."

During Emery's testimony, Olson disrupted the trial and repeatedly accused Emery of lying:

> Q. I wasn't until your friend, Aaron Olson, got from the driver's side of the vehicle, came to the bench where you were sitting, that he told you he was going to have sex with [G.C.] according to --
>
> DEFENDANT OLSON: You are sitting there lying, man.
>
> THE COURT: Mr. Olson.
>
> DEFENDANT OLSON: This is perjury.
>
> . . . .
>
> Q. Just to be clear, the only person that you ever talked to in that vehicle that night was your friend, Aaron Olson?
>
> DEFENDANT OLSON: That's a lie. I was not there.

14RP 693-94, 708-09.

The trial court observed the prejudicial effect of the disruption and warned Olson about his outbursts:

> What you are trying to do is get your side of the story before the jury while somebody else is testifying and presenting their side of the story, while disrupting their right to have their testimony heard, and without being under oath unlike any other witness here. Now you don't have a right to do that.

14RP 696.

It is apparent from the court's remarks that Olson's highly inflammatory accusations distracted the jury at a time when the jury's complete and undivided attention was essential to Emery who exercised his right to testify to convince the jury of his innocence. To Emery's detriment, Olson's outbursts compounded the prejudicial effect of the antagonistic and mutually exclusive defenses. Given the fact that the testimonies of Officer Heilman and G.C. supported the critical aspects of Emery's defense, there is a reasonable probability the result of a separate trial would have been different because the jury would not have unjustifiably inferred guilt from conflicting defenses. In re Personal Restraint of Davis, 152 Wn.2d 647, 711-12, 101 P.3d 1 (2004). [3]

Reversal is required because Emery was denied his constitutional right to effective assistance of counsel which consequently deprived him of a fair trial and a meaningful opportunity to present a complete defense. Strickland, 466 U.S. at 687; California v. Trombetta, 467 U.S. at 485.

[3] Contrary to the Court of Appeals' conclusion, it is clear from the record that Emery's counsel did not make a strategic decision to proceed with a joint trial. After the trial, defense counsel filed a motion for a new trial and argued the motion at sentencing. CP 207-08; 18RP 8. It is evident from defense counsel's motion that he recognized that Emery and Olson had "antagonistic defenses" and it was therefore necessary to sever the trials. The record reflects that he mistakenly believed it was sufficient that co-counsel moved to sever. Defense counsel obviously would not have argued that the trial court erred in denying the motions to sever if his trial strategy was to have a joint trial.

3. REVERSAL IS REQUIRED BECAUSE CUMULATIVE ERROR DEPRIVED EMERY OF HIS CONSTITUTIONAL RIGHT TO A FAIR TRIAL.

Under the cumulative error doctrine, a defendant may be entitled to a new trial where errors cumulatively produced a trial that was fundamentally unfair. In re Personal Restraint of Lord, 123 Wn.2d at 332. Here, the accumulation of errors rendered Emery's trial fundamentally unfair: 1) the prosecutor committed misconduct during closing argument by undermining the presumption of innocence, shifting the burden of proof, and misstating the role of the jury; 2) the trial court erred in refusing to sever the defendants where the defenses were antagonistic and mutually exclusive; 3) defense counsel failed to move for a severance or join co-counsel's motions to sever; 4) Emery was deprived of his constitutional right to present a complete defense as a result of the joint trial.

The cumulative impact on Emery's trial warrants reversal.

D. CONCLUSION

For the reasons stated, and as due process requires, this Court should reverse Mr. Emery's convictions and remand for a new and fair trial.

DATED this 21st day of November, 2011.

Respectfully submitted,

/s/ Valerie Marushige
VALERIE MARUSHIGE
WSBA No. 25851
Attorney for Petitioner, Anthony Emery, Jr.

DECLARATION OF SERVICE

On this day, the undersigned sent by U.S. Mail, in a properly stamped and addressed envelope, a copy of the document to which this declaration is attached to Thomas Roberts, Pierce County Prosecutor's Office, 930 Tacoma Avenue South, Tacoma, Washington 98402.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 21st day of 2011, in Kent, Washington.

/s/ Valerie Marushige
VALERIE MARUSHIGE
Attorney at Law